



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of White Lake Beach, Inc., White Lake Country Club, Inc., and White Lake Property Owners Association, Inc., for a Permit to Place a Water Intake Structure for Irrigation Purposes on the Bed of White Lake, and Department Order Establishing a Minimum Water Level for White Lake, Town of Montello, Marquette County

Case Nos 3-NE-98-359UF and
3-NE-98-0360UF

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

White Lake Beach, Inc., White Lake Country Club, Inc., and White Lake Property Association, W1680 Country Club Drive, Montello, Wisconsin 53949, applied to the Department of Natural Resources for a permit to place a water intake structure on the bed of White Lake for the purpose of irrigating the golf course. Any permit issued would include an established minimum water level for White Lake, below which no diversion could occur. That minimum level will be 94.5 feet when referenced to the Department's bench marks. The project is located in Government Lot 6, Section 1, Township 15 North, Range 10 East, Marquette County, Wisconsin.

On August 26, 1998, the Department of Natural Resources issued a Notice of Proposed Structure which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department received numerous timely objections.

On March 19, 1999, the file was forwarded to the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on May 18, 1999, at Montello, Wisconsin, before Jeffrey D. Boldt, administrative law judge (the ALJ).

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows.

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

White Lake Beach, Inc.
White Lake Country Club, Inc, by

Frank Scharenberg, President
W1680 C.C. Drive
Montello, WI 53949

White Lake Property Owners Association, Inc , by

Ken Pientka, President
W1904 White Lake Court
Montello, WI 53949

White Lake Management District, by

Michael Johnson, Commissioner
N4808 White Lake Drive
Montello, WI 53949

Adam Pientka
W1926 White Lake Court
Montello, WI 53949

John D. Guzzetta
W1857 Fawn Court
Montello, WI 53949

Eunice Becker
8159 West Glen Avenue
Milwaukee, WI 53218

or N4656 White Lake Drive
Montello, WI 53949

Robert J. Grsch
1875 Wolters Road
Montello, WI 53949

or 17665 Lisa Lane
Brookfield, WI 53045

John Flynn
W1760 White Lake Lane
Montello, WI 53949

Donald Hill
1218 Willow Street
Belvidere, IL 61008

Lisa Vich
W1772 White Lake Lane
Montello, WI 53949

FINDINGS OF FACT

1. White Lake Country Club, Inc., White Lake Beach, Inc. and the White Lake Property Owners Association, Inc., c/o W1680 Country Club Drive, Montello, Wisconsin, 53949, completed filing an application with the Department for a permit under sec 30 12, Stats , to place a small pump house for intake from White Lake on the bed of White Lake, Town of Montello, Marquette County. The Department and the applicants have fulfilled all procedural requirements of secs. 30 12 and 30.02, Stats

2 White Lake Beach, Inc owns real property located in the Government Lot 6, SE ¼, NE ¼ in Section 1, Township 15 North, Range 10 East, Marquette County. The above-described property abuts White Lake which is navigable in fact at the project site

3. The applicants propose to construct a small pump house with a six inch intake of water from the lake.

4 The purpose of the intake structure is to irrigate the golf course, to lower White Lake in times of high water and for fire protection. The applicants have pumped White Lake since the high water years of 1987 and 1988.

5 The proposed structure will not materially obstruct existing navigation on White Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit.

6. In conjunction with the structures permit relating to the intake pump house, the DNR is seeking to establish a public interest water level of 94.5 feet. This would prohibit the pumping of the lake when water levels fall below this level

There is no serious factual dispute that pumping has significantly reduced the water level on White Lake. DNR engineer Linda Hyatt provided undisputed expert testimony that pumping 200,000 gallons a day for five months would reduce the water level by two inches per year. Over the ten year period of pumping, Hyatt calculated a sixteen inch reduction in water levels

attributable to the pumping undertaken by the co-applicants. Further, given the 13 to 1 slope along parts of the shoreline, the surface water area of the lake has declined at a rate of approximately two acres for each one foot reduction in water level. (Hyatt, Ex 24)

7 DNR Lake Management Specialist Mark Sesing testified there would be a detrimental impact on near-shore vegetation if the lake were pumped below the proposed minimum public interest level. The littoral zone is the nearshore area which is the most significant and diverse habitat area for plant, fish and wildlife species. (Bartz, Sesing Ex. 22) Artificial deductions of water levels threaten the growth of submergent vegetation, which would detrimentally impact fishery values. (Bartz) Further fragmented, non-contiguous habitat areas are particularly detrimental to frogs, turtles and other amphibians. (Sesing)

8. The DNR staff recommendation of a public interest minimum water level of 94.5 reflects an appropriate balancing of the competing interests of lake users. Mr. Grash spoke of problems in navigation in the shallow, north-shore area of White Lake. Grash also noted that the decline in water levels from 1996 to 1999, has forced his sons to go farther away from shore to find water deep enough to swim in. This exposes them to the risk of being in the pathway of motor boats. Grash, and other shallow, north-shore area residents would like to see a water level even higher than the 94.5 foot minimum requested by the Department. Conversely, Mr. Sharenberg's resort business has more beach exposure when water levels are lower. Mr. Flynn advocated for a lower level, representing the interests of residents of the southeast shoreline. Ms. Vich presented photographs that demonstrated that higher water levels limit beach areas for southeast shoreline residents and, to some degree, threaten shoreline erosion in these areas.

The DNR has properly balanced these competing interests in establishing a public interest minimum water level of 94.5 feet.

9. To facilitate goodwill and to ensure that the pump is not used when the water level is below the public interest minimum, the resort and country club shall share electric bills relating to pump use with the Property Owners Association and with the DNR.

10. The applicants are financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

11. The proposed structure will not reduce the effective flood flow capacity of White Lake upon compliance with the conditions in the permit.

12. The proposed structure will not adversely affect water quality nor will it increase water pollution in the White Lake. The structure will not cause environmental pollution as defined in sec. 299.01(4), Stats., if the structure is built and maintained in accordance with this permit.

13. All parties agreed that the diversion of water undertaken by the co-applicants does not require a sec. 30,18, Stats. permit because it is substantially less than an average of two million gallons per day in any 30 day period.

14 The Department of Natural Resources has complied with the procedural requirements of sec 1.22, Stats , and Chapter NR 150, Wis. Admin Code, regarding assessment of environmental impact

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of sec. 30.12, Stats.
- 2 The proposed facility described in the Findings of Fact constitutes a structure within the meaning of sec 30.12, Stats.
- 3 The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
- 4 The project is a type III action under sec. NR 150 03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
5. The DNR has authority pursuant to sec. 31.02(1), Stats., to order a fixed "level for a body of navigable water below which the same shall not be lowered " The DNR's determination of a "public interest water level" at 94.5 is reasonable and necessary

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30 12, Stats , for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

- 1 The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
- 3 A copy of this permit shall be kept at the site at all times during the construction of the structure
4. The permit granted herein shall expire three years from the date of this decision, if the structure is not placed before then.
- 5 The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U S Army Corps of Engineers.

6. White Lake Beach, Inc and the White Lake Country Club, Inc. shall provide copies of electric bills relating to use of the pump with the White Lake Property Owners Association and with the DNR Area Water Management Specialist.

7. The permittee shall notify the Area Water Management Specialist, not less than five working days before placement of intake pipe.

8. The permit-holder shall not pump water when the lake level falls below 94.5 feet, which is the established public interest minimum.

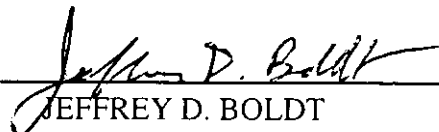
ORDER

WHEREFORE IT IS HEREBY ORDERED, that pursuant to sec. 31.02(1), Stats., that there be established a public interest minimum of 94.5 feet on White Lake in Marquette County, Wisconsin.

Dated at Madison, Wisconsin on June 25, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.